

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN)	
)	
v.)	No. 3:96-0380
)	JUDGE CAMPBELL
RICKY BELL, Warden)	DEATH PENALTY

ORDER

Pending before the Court is Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 254). Because the Motion is a second or successive petition subject to 28 U.S.C. § 2244, this case is transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6th Cir. 1997).

Petitioner, in this capital habeas corpus case, has moved pursuant to Fed. R. Civ. P. 60(b) for relief from this Court's Judgment of April 8, 1998 (Docket Nos. 205 and 206). Abdur'Rahman v. Bell, 999 F.Supp. 1073 (M.D. Tenn. 1998), aff'd. in part and rev'd. in part, 226 F.3d 696 (6th Cir. 2000), cert. denied, 122 S.Ct. 386 (2001), pet. for reh'g pending. The Rule 60(b) Motion is predicated upon a new Tennessee Supreme Court Rule, Rule 39 ("Rule 39"), adopted on June 28, 2001.¹

¹ Tennessee Supreme Court Rule 39 reads as follows:

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim

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(continued...)

In the 1998 Judgment, this Court ruled that certain of Petitioner's claims had not been exhausted in state court and, therefore, were defaulted. Based on new Rule 39, Petitioner asserts that a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes and, therefore, the claims in question were exhausted and the Court must now rule on the merits of those claims.

Respondent asserts that this Rule 60(b) Motion is actually a second or successive petition subject to 28 U.S.C. § 2244. The proper procedure, according to Respondent, is for this Court to transfer the matter to the Sixth Circuit for its determination of whether the Rule 60(b) Motion satisfies the gateway criteria of 28 U.S.C. § 2244(b). Respondent relies primarily on McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996). In McQueen, the Sixth Circuit held "[w]e agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition...." Id. See, also, United States v. Rich, 141 F.3d 550, 551 (5th Cir. 1998); Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998) (en banc); Felker v. Turpin, 101 F.3d 657, 660-61 (11th Cir. 1996); and United States v. Hernandez, 158 F.Supp.2d 388, 391 (D. Del. 2001).

Petitioner argues that this Rule 60(b) Motion is not a second or successive petition because it raises no new claims, no new facts, and does not rely on new law. Petitioner relies primarily on Rodriguez v. Mitchell, 252 F.3d 191, 198-200 (2nd Cir. 2001). In Rodriguez, the Second Circuit held "a Motion under Rule 60(b) to vacate a judgment denying habeas is not a


¹(...continued)
presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b).” Id. at 198.

In the Sixth Circuit, when a petitioner raises new matters in a Rule 60(b) Motion challenging the previous denial of a § 2254 habeas corpus petition, the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition. McQueen v. Scroggy, 99 F.3d at 1334-35. 28 U.S.C. § 2244(b)(3)(A) provides: “Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”

Because this Rule 60(b) Motion presents a new theory predicated on a new rule of law adopted by the Tennessee Supreme Court over three years after this Court’s Judgment, the Court finds that the Motion is a second or successive habeas petition subject to 28 U.S.C. § 2244. Accordingly, this Court is without jurisdiction to decide the Rule 60(b) Motion. The case is hereby transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6th Cir. 1997).

It is so ORDERED.


TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE